

### **Remarks**

Claims 1-5 and 7-18 and 20, 21 and 23 are currently pending in the application. Claims 1, 2, 3, 4, 5, 9, 10, 11, 13, 14 and 18 have been amended in this paper. Claims 8 and 23 have been cancelled in this paper. New claim 24 has been added. The amendments made to the application are all supported by the specification as originally filed.

### ***Claim rejections – 35 USC § 103***

#### **Rejection of claims 1, 3-5, 7-10, 12-16 and 18 under 35 USC § 103 in view of Yeager and Nadeau**

In the office action, Claims 1, 3-5, 7-10, 12-16 and 18 were also rejected in paragraph 2 of the office action on the basis of 35 USC § 103(a) as being obvious in view of the primary reference of Yeager when combined with the secondary reference of Nadeau.

Claim 1 has been amended in this paper to include the following additional features:

“first and second nodes connected to the spine member at opposite ends of the spine member...”

This feature finds basis in page 2 line 29-page 3 line 2, page 4 lines 1-3, page 6 lines 17-20 and Figs 1-3 and 6-8.

“each of the first and second nodes having first and second ends, and having connection devices for connecting and disconnecting a respective spine member at each end of the node”

This feature finds basis in page 10, line 11 to page 11, line 2, and Figs 11-14.

“at least one lateral attachment member releasably coupled to each node,”

This feature finds basis in page 2 line 29-page 3 line 2 and claim 8, and page 3 lines 17-20 which teaches that a single attachment member per node is sufficient.

“each releasable fastener device is coupled to a respective lateral attachment member on each of the nodes”

This features finds basis in page 9, line 22 through page 10 line 9, and in Figs 9 and 10.

These additional features of claim 1 distinguish the invention claimed therein further

from Yeager and Nadeau. Yeager does not disclose or suggest the provision of nodes on the spine member, nor the provision of two connectors on each of the nodes to couple the spine member thereto, nor the provision of lateral attachment members at each of the nodes. Neither does Yeager disclose or suggest the feature of a releasable fastener on each lateral attachment member. Nadeau does not disclose or suggest these features either. Applicant therefore submits most respectfully that these claims are allowable over the prior art of record, and requests withdrawal of the rejections issued.

#### Declarations of Stephen and Ford

In support of the rejection, the examiner has argued that the declarations of Ford and Stephen are not sufficient to overcome the rejections. Applicant respectfully disagrees.

Notwithstanding the amendments made to the claims to distinguish further the invention claimed from the disclosure of Yeager and Nadeau, applicant maintains that Yeager would not be modified to include a harness, wherever that feature of the harness came from, either from Nadeau or elsewhere, because of the section at column 1, lines 19-38 and 53-54 already discussed in earlier papers.

Specifically, the examiner contends that the declaration of Ford is insufficient to overcome the rejection on the basis that the references are clearly combinable in view of the fact that they come from the same general art area, namely that of devices that guide children during walking. While it may be true that the two documents come from the same general field, that fact alone is insufficient to sustain the objection, but rather must be weighed against Ford's assertion in paragraph 11 of the declaration that: "I would not consider that Nadeau has any features that would enhance the Yeager product, and I would not be tempted to combine any features from the Nadeau product into the Yeager design" because their fundamental methods of operation are different. Mr. Ford is clearly knowledgeable of the filed and skilled in the art to which this invention pertains. Thus, it is inappropriate for the examiner to substitute his personal observation over that of a person skilled in the art.

Further, the examiner's rebuttal ignores the specific and clear teaching of Yeager at

column 1, lines 19-38 and 53-54 that harnesses are not suitable for use with the Yeager system. "It is improper to combine references where the references teach away from the combination." MPEP § 2145(X)(D)(2); *In re Grasselli*, 713 F.2d 731, 743 (Fed. Cir. 1983). Yeager's teaching against the use of any kind of fastener device strongly persuades the skilled person reading Yeager to conclude that while similar documents may be considered in the same general area, any that specifically suggest harnesses or other attachment mechanisms are leading in a direction that is quite opposite to what Yeager has already taught, and that Yeager is clearly trying to move away from that kind of system. Accordingly, as declared by Ford, the skilled person would not make the modification proposed by the examiner.

"The ultimate determination of patentability must be based on consideration of the entire record, by a preponderance of the evidence, with due consideration to the persuasiveness of any arguments and any secondary evidence." MPEP § 716.01(d); *In re Oetiker*, 977 F.2d 1443 (Fed. Cir. 1992). This includes opinion evidence, which "is entitled to consideration and some weight so long as the opinion is not on the ultimate legal conclusion at issue." MPEP § 716.01(c)(III). In particular, "weight ought to be given to a persuasively supported statement of one skilled in the art on what was not obvious to him." *In re Lindell*, 385 F.2d 453 (CCPA 1967).

Applicant has submitted rebuttal evidence in the form of two declarations, one by Peter Braden Ford, one skilled in the art of product design, and the other by Elaine Stephen, the inventor of the claimed apparatus, also skilled in the field. "Facts established by [this] rebuttal evidence must be evaluated along with the facts on which the conclusion of a prima facie case was reached, not against the conclusion itself." MPEP § 716.01(d); *In re Eli Lilly*, 902 F.2d 943 (Fed. Cir. 1990). Importantly, all of the competent rebuttal evidence presented by Applicant must be evaluated "as a whole," not merely as individual pieces, and as a whole weighed against evidence supporting the prima facie case. MPEP § 716.01(d); *In re Piasecki*, 745 F.2d 1468, 1472 (Fed. Cir. 1984). In this case, the evidence submitted is vast and completely contrary to the basis for the rejection asserted by the examiner.

Also, the examiner has deemed the Ford declaration as unpersuasive on the basis that there would be a reasonable expectation of success in the combination. Applicant strongly

disagrees with this conclusion. The declaration of Ford, and particularly paragraph 11 thereof, establishes direct and independent evidence of an *expectation of failure* of such a combination, rather than success and this arises because the skilled person would appreciate that harnesses are incompatible with Yeager, whether they are taught in documents coming from the same technical field or not. Indeed, Ford points out that “Yeager criticizes the use of ‘tethers, buckles, rings, and poles’” as being “potentially dangerous, ‘leash-like’ and ‘controlling.’” Testimony of individuals skilled in the art is entitled to substantial weight. *Orthopedic Equipment Co. v. United Sates*, 702 F.2d 1005 (Fed. Cir. 1983). Moreover, such evidence “must always when present be considered en route to a determination of obviousness.” MPEP § 71.01(a) (quoting *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1538 (Fed. Cir. 1983)). Accordingly, applicant maintains that the claimed feature of the releasable fasteners is not suggested by the combination of Yeager and Nadeau.

The declaration of Stephen was dismissed on two bases. Firstly that the declaration is attesting to commercial success, but that no sales data has been submitted, and secondly on the basis that “there is no evidence that the products that received the awards are commensurate in scope with the invention as set forth in the instant claims”.

A significant teaching of the Stephen declaration is to provide direct evidence of the overwhelmingly positive and surprising reaction of peers and professional award bodies to the features of the invention claimed, without regard to sales figures or other monetary measures of commercial success. This evidence is direct and uncontroverted evidence of recognition by those skilled in the art of the nonobviousness of the invention. Specifically, it attests to the unexpectedness of the invention, the excitement in the industry to the entry of the invention and highlights a need for such an invention. These are support the position that the invention was not obvious. Thus, the Stephen declaration should be considered not only as an indication of commercial success, but also as an indication of the conclusions of independent scrutiny of the novel and surprising features of the claimed invention. As is stated throughout the Stephen declaration, the consistent reaction of the judges in every case presented was that the product was very innovative and not at all obvious. This is evidenced by the award certificates appended to the declaration. The sheer volume of such design awards cannot be ignored and presents direct

evidence of the non-obviousness of the invention to those of ordinary skill in the field.

Furthermore, Applicant respectfully points out that the second basis of the examiner's refusal to consider the declaration of Stephen is not correct. The declaration specifically attests to the identity between the product that received the awards and the invention claimed in the application. This attestation is set forth at the end of the declaration, in paragraph 6, second sentence, which states "...*These awards were, in each case, directed to the product that is claimed in the present application...*". Indeed, the embodiment of the invention that the applicant submitted to all the individuals that considered it and that has been introduced into the marketplace is the product that is specifically claimed and includes all the limitations in at least claim 1.

Based on the foregoing, Applicant respectfully requests reconsideration of this objection, as the basis for the rejection appears to be incorrect.

Applicant respectfully submits that claim 1 and new claim 24 are allowable for at least the same reasons as presented in the last response filed January 16, 2008, and requests favorable reconsideration of the present application on that basis. However, if the next office action upholds the objection Applicant respectfully requests that the examiner identify in the office action the factual evidence that is sufficient to outweigh Applicant's rebuttal evidence, as required by the preponderance of evidence test of MPEP § 716.01(d). In particular, Applicant has rebutted the Examiner's contention that the teachings of Yeager and Nadeau are combinable with testimony from one skilled in the art that Nadeau has nothing to offer in terms of features that could be combined with Yeager. Declaration of Ford at paragraph 11. Further, Applicant has rebutted the Examiner's contention that one would have a reasonable expectation of success from the combination with testimony from one skilled in the art that Yeager teaches away from the features of Nadeau and that therefore there would be a reasonable expectation of failure. *Id.* Still further, Applicant has presented overwhelming evidence of the nonobviousness of the invention by way of the awards and commendations received by the claimed product. Declaration of Stephen at paragraphs 3-6 and appendices. Accordingly, Applicant respectfully submits that the evidence on record tips the balance strongly in favor of nonobviousness.

Rejection of claim 2 under 35 USC § 103(a) in view of Yeager, Nadeau and Nero/Tonuzzi/Deveaux

Claim 2 was rejected in paragraph 3 of the office action. Claim 2 is dependent on claim 1, and contains the same limitations. Applicant argues that Claim 2 is allowable for the same reasons as indicated above.

Rejection of claim 17 under 35 USC § 103(a) in view of Yeager, Nadeau and Nero

Claim 17 is dependent on claim 1, and includes all of the features of claim 1, including the releasable fastener device. As argued above, newly amended product claim 1 is allowable over the prior art of record, and accordingly the applicant submits that this dependent claim is therefore also allowable, for the same reasons. Accordingly the rejection on the basis of this combination (or any combination based on Yeager) is not sustainable and is most respectfully traversed. The applicant notes that the examiner's rejection of claims 2 and 17 requires the combination of at least three prior art documents. It is respectfully submitted that such a combination is extremely unlikely to be successful and highlights the further nonobviousness of the claimed invention.

Rejection of claims 20-23 under 35 USC § 103(a) in view of Yeager, Nadeau and Gandelman

Rejection of these claims is respectfully traversed. The arguments set forth in the previous response are maintained. As argued above, the evidence on file from the independent expert toy designer Ford disproves the examiner's contention that the references of Yeager and Nadeau would be combined.

Allowability of Claim 11.

Applicant gratefully acknowledges the indicated allowability of claim 11. Claim 11 has been amended to incorporate the features of claim 1, claim 8 and claim 9. The features of claim 10, from which claim 11 previously depended, have not been incorporated since the main feature of claim 11 as previously submitted was the pivotal attachment, which has now been expressed in clearer terms in the new claim 11. Applicant submits that the new independent claim 11 is now allowable.

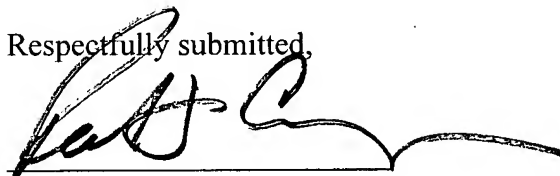
Claim 13 has been amended to focus on a particularly advantageous embodiment of the invention, having rigid detachable arms, as disclosed in page 3 line 7.

New claim 24 has been added by this amendment. New claim 24 is similar to prior claim 1 and contains additional features relating to the arms and the spine member, none of which is found in the prior art of record, and it is submitted that, for all the reasons outlined above with respect to amended claim 1, new claim 24 is allowable.

It is respectfully submitted that all pending claims are in condition for allowance, and Applicant respectfully requests that allowance be granted at the earliest date possible. Should the Examiner have any questions or comments regarding Applicant's amendments or response, the Examiner is asked to contact Applicant's undersigned representative at (215) 988-3303.

If there are any fees due in connection with the filing of this Amendment, please charge the fees to our Deposit Account No. 50-0573.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert E. Cannuscio', with a long horizontal flourish extending to the right.

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